

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

BUTTE DIVISION

FILED
BILLINGS DIV.
2011 AUG 8 PM 1 47
PATRICK E. DUFFY, CLERK
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JOHN KESSEL,)
Petitioner,) Cause No. CV-11-35-BU-~~REC'D BY CLERK~~
v.) ORDER ADOPTING FINDINGS
ROBERT DOOLEY; ATTORNEY) AND RECOMMENDATIONS OF
GENERAL OF THE STATE OF U.S. MAGISTRATE JUDGE
MONTANA,)
Respondents.)

)

United States Magistrate Judge Carolyn Ostby has entered Findings and Recommendation (*doc. 4*) with respect to Kessel's 28 U.S.C. § 2254 petition for writ of habeas corpus. *Doc. 1.* Judge Ostby recommends the petition be dismissed for lack of jurisdiction as a second petition challenging the same conviction. Judge Ostby further recommends Kessel's motion for leave to proceed in forma pauperis be denied as moot.

Upon service of a magistrate judge's findings and recommendation, a party has 14 days to file written objections. 28 U.S.C. § 636(b)(1). Kessel has filed timely objections. *Doc. 5.* Accordingly, the Court must make a *de novo*

determination of those portions of the Findings and Recommendations to which objection is made. 28 U.S.C. § 636(b)(1). For the following reasons, Kessel's objections are overruled.

Kessel's first objection is that Judge Ostby erred in concluding that he misrepresented the amount of money in his prison trust account. Kessel, however, admits in his objection that he did not claim the "meager" amount of money because he does not receive W-2's or 1099 forms on this income and is not required to pay income tax on it. In any event, Judge Ostby also concluded the motion to proceed in forma pauperis was moot because Kessel's petition must be dismissed for lack of jurisdiction.

Second, Kessel objects to the denial of his petition on the grounds that he wrote the Clerk of Court for a sentence modification form and they sent him the § 2254 form. Regardless, this does not change the fact that this Court lacks jurisdiction over this petition because it is a second or subsequent petition challenging the same conviction. Nor does it change the fact that even if this were Kessel's first petition, his claims would be untimely and procedurally barred.

Third, Kessel objects to Judge Ostby's recommendation that a certificate of appealability be denied on the grounds that Article I, § 9, Clause 2 of the U.S Constitution prohibits the suspending of the writ of habeas corpus. But contrary to

Kessel's assertion, this provision does not prohibit this Court from denying his petition.

After a de novo review, the Court determines the Findings and Recommendation of Magistrate Judge Ostby are well grounded in law and fact and adopts them in their entirety.

Accordingly, **IT IS HEREBY ORDERED** as follows:

- (1) Kessel's petition (*doc. 1*) is DISMISSED for lack of jurisdiction because it is an unauthorized second petition;
- (2) Kessel's motion to proceed in forma pauperis (*doc. 2*) is DENIED AS MOOT; and
- (3) a certificate of appealability is DENIED.

The Clerk of Court is directed to enter a judgment of dismissal.

DATED this 8 day of August, 2011



RICHARD F. CEBULL
UNITED STATES DISTRICT JUDGE